Before The
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 and	)	WT Docket No. 96-18
Part 90 of the Commission's	)	
Rules to Facilitate Future	)	
Development of Paging Systems	)	
	)	
Implementation of Section	)	PP Docket No. 93-253
309(j) of the Communications	)	
Act -- Competitive Bidding	)	

To: The Commission

COMMENTS AND REQUEST FOR CLARIFICATION

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SUMMARY

The Law Firm of John D. Pellegrin, Chartered, on behalf of several Commercial Mobile Radio Service (CMRS) applicants submits Comments regarding the Notice of Proposed Rulemaking ("*Notice*") issued by the Commission in the above-referenced proceeding. These Comments urge that the proposed interim processing rules for paging applications are simply unfair. The proposed rules impose an impermissible retroactive effect on previously-filed applications, and fail to meet the five-pronged test with respect to retroactive application of agency decisions. Furthermore, the Commission's proposed rules violate Section 309(j)(7)(A) of the Communications Act, as the rules are based on the expectation of Federal revenues from the use of a system of competitive bidding. Commentor's own Counterproposal suggests reasonable alternatives which will accomplish the Commission's stated goals for the future development of the paging industry without penalizing pending applications. These Comments also address inconsistencies and ambiguities in the Commission's proposed rules.

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In the Matter of	)	
	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

COMMENTS AND REQUEST FOR CLARIFICATION

The Law Firm of John D. Pellegrin, Chartered, on behalf of several Commercial Mobile Radio Service (CMRS) applicants (specifically 931 MHz paging applicants), hereby submits Comments requested by the Notice of Proposed Rulemaking ("*Notice*") issued by the Commission in the above-referenced proceeding.[1] These Comments will address the proposed interim processing rules contained.[2] The proposed interim processing rules, as applicable to certain previously-filed applications, are simply and grossly unfair. Insofar as the proposed rules would bar the processing of applications which were properly filed under the Commission's own pre-existing rules, the proposed rules impose an unjustifiable retroactive effect on those previously-filed applications. The

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[1] The 931 MHz paging applicants described above have applications which are currently pending before the Commission, and which will be directly affected by the Commission's proposed filing freeze and interim processing rules.

[2] The Comment date established in the Notice for the proposed interim processing rules is March 1, 1996.

interim rules suggested in the Counterproposal below will accomplish the Commission's goal for the future development of the paging industry without penalizing those applicants who have already made substantial investments in their respective paging applications and proposed service. These Comments also address inconsistencies in the Commission's proposed rules which adversely affect all pending paging applicants. Finally, it is requested that the Commission clarify ambiguities and other concerns not addressed in its proposed interim processing rules. In support whereof, the following is submitted.

I. Background

In its *Notice*[3], the Commission's stated purpose was to establish a comprehensive and consistent regulatory scheme that would simplify and streamline licensing procedures and provide a flexible operating environment for all paging services. Proposed were rules for a geographic licensing approach, whereby licenses for a specified area would be issued through competitive bidding procedures.

The Commission briefly described the regulatory history of paging services, comparing the development of private carrier paging (PCP) and common carrier paging (CCP) services. In the description the Commission focused on the so-called rewrite of its Part 22 Rules governing 931 MHz paging frequencies (*Part 22 Rewrite Order*):

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[3] The *Notice* was adopted February 8, 1996, and released February 9, 1996.

> In the *Part 22 Rewrite Order*, the Commission revised its licensing rules for all Part 22 services and specifically adopted new licensing rules for 931 MHz paging frequencies, which were intended to correct the problems the had impeded licensing under the old rules (footnote omitted). The *Part 22 Rewrite Order* provided that, as of January 1, 1995, all 931 MHZ applicants (including those who had applications pending under the old rules) would be required to specify channels in their applications. (footnote omitted). The *Part 22 Rewrite Order* further provided that after a 60-day filing window for such channel-specific applications, the Commission would grant those applications that were not mutually exclusive and use competitive bidding to select among the mutually exclusive applications. (footnote omitted). The *Part 22 Rewrite Order* did not establish competitive bidding procedures for mutually exclusive applications. Thus, pending mutually exclusive applications cannot be resolved until such rules are adopted.
>
> However, on December 30, 1994, the Commission stayed the effective date of new Section 22.131 (formerly C.F.R. § 22.541) of our rules as it applies to 931 MHz paging, as well as the opening of the 60-day filing window for amendment of pending 931 MHz applications. (footnote omitted). <u>In addition, we will use a 30-day filing window to define mutually exclusive applications as provided under our old paging rules, rather than the 60-day filing window adopted in the *Part 22 Rewrite Order*</u>. *Notice*, at ¶ 11-12. (<u>emphasis supplied</u>)

Purportedly to facilitate this transition, the Commission adopted interim processing rules in the *Notice*. First, the Commission suspended acceptance of new applications for paging channels as of the adoption date of this *Notice*. (There were exceptions made for existing licensees making certain modifications to their systems.)

The Commission addressed the status of pending applications:

> With respect to processing of pending applications that were filed prior to the adoption of this *Notice* and that remain pending, we will process such applications provided that (1) they are not mutually exclusive with other applications as of the adoption date of this *Notice*, and (2) the relevant period for filing competing applications has expired as of the adoption date of this *Notice*...Processing of mutually exclusive pending

> applications and applications for which the relevant period for filing competing applications has not expired will be held in abeyance until the conclusion of this proceeding." *Notice*, at ¶ 144.

The Commission then set out the interim "standards" by which applications would be processed:

> By this *Notice*, we retain the existing stay of the new Part 22 licensing rules until competitive bidding procedures are established in this proceeding. We will therefore process 931 MHz CCP applications which were pending prior to the adoption of this *Notice*, and for which the 60-day window for filing competing applications has expired, under the application procedures in effect prior to January 1, 1995. Consequently, pending 931 MHz CCP applications that are not mutually exclusive with other applications will be processed, while mutually exclusive applications will be held pending the outcome of this proceeding. *Notice*, at ¶ 144.

II. Comments on FCC Proposal

The Commission's action with respect to applications filed in accordance with existing FCC rules is unfair and constitutes an unreasonable retroactive application of the Commission's rules. It is well-settled that the retroactive application of administrative rules and policies is looked upon with great disfavor by the courts.[4]

The retroactive extension of the freeze and interim processing rules to 931 MHz paging applicants in particular, filed as they were in accordance with the Rules and policies of the Commission then in effect at the time of filing, would not appropriately strike the balance between the significant mischief of disrupting

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[4] *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 208 (1988)(retroactivity is not favored in law); *Yakima Valley Cablevision v. FCC*, 794 F. 2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and have noted its troubling nature.")

the normal and routine 931 MHz paging licensing process and depriving applicants of their rights and equitable expectancies, versus the dubious benefit of auctioning spectrum which, as the Commission itself admits in the *Notice*,[5] is already heavily licensed.

When balancing the various harms and benefits of retroactive application of agency adjudicative decisions, courts have applied a five-factor test:

> (1) whether the issue presented is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of burden which a retroactive rule imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[6]

The application of all five criteria militate against the Commission's freeze and proposed interim processing rules regarding previously-filed applications. This is a case of first impression for paging services. The Commission's proposed rules are a departure from the practice established in two recent Commission decisions.[7] In both cases, the Commission decided that equitable considerations barred the retroactive application of new rules to previously filed applications. The same equitable considerations

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[5] See *Notice*, at ¶13 ("According to our records, CCP channels are heavily licensed, particularly in major markets.")

[6] Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972)("Retail Union").

[7] *Multipoint Distribution Service (Filing Procedures and Competitive Bidding Rules)*, 78 RR 2d 856 (1995) ("MDS Order"); *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7387 (1994) ("Cellular Unserved Order").

are applicable in the instant situation, and the Commission should extend the same type of treatment to bar retroactivity in this case.

It is manifestly clear that the applicants in this case relied heavily on the former rule. Logic dictates that no reasonable person would file an application secure in the knowledge that the administrative agency accepting that application was about to change its rules rendering that application ungrantable. Applicants expended considerable resources to ensure their applications complied with Commission rules then in effect, relying completely on those sets of administrative guidelines. The retroactive burden imposed on the applicants is substantial, since the resources expended will be entirely wasted if the Commission holds these applications in abeyance and eventually dismisses them after the auction rules are adopted.

Finally, there is no statutory interest in applying the new rules that requires the draconian treatment proposed by the Commission. As noted *infra*, there is no valid reason to institute a freeze at all in this situation. The Commission could simply announce it will utilize auctions for those applications which proved ultimately to be mutually exclusive after the new rules are established. Dismissing pending applications in order to generate increased auction revenues is barred by Section 309(j)(7)(A) of the Communications Act. Consequently, the Commission's proposed rules fail the five-pronged test of *Retail Union*. Having so failed, the Commission should grandfather the pending applications and process

them under the rules in effect at the time the applications were filed.

In defense of its own actions, the Commission states that:

> We believe that after the public has been placed on notice of our proposed rule changes, continuing to accept new applications under the current rules would impair the objectives of this proceeding. We also note that this is consistent with the approach we have taken in other existing services where we have proposed to adopt geographic area licensing and auction rules. *Notice*, at ¶ 139. (emphasis supplied)

However, this approach is not consistent with the Commission's prior action taken with respect to 931 MHz paging licenses. As noted above, the Commission in the *Part 22 Rewrite Order* established new rules specifically for the 931 MHz paging service. It proposed a solution which properly looked forward by establishing rules for applications filed in the future, while simultaneously proposing processing rules handling previously filed applications. No filing freeze was imposed, despite the fact that notice was given that auction procedures would be established for applications filed in the future.

The Commission's treatment of applications pursuant to the recent *Part 22 Rewrite Order* completely belies the rationale for establishing an application freeze in the instant case, at least with respect to 931 MHz paging applications. Nor is there any need for an application freeze in this case, as there was no need in the *Part 22 Rewrite* situation. As will be seen in the Counterproposal below, any reopening of a filing window with respect to those applications already on file should result in few if any additional applications being filed.

First, no new windows would be opened under this Counterproposal with respect to applications not already on file. In addition, compliance with such reopened window, in terms of preparing and filing an application to meet the short filing period restrictions, would be difficult, if not impossible. The potential applicant would not only have to perform the standard frequency searches for available spectrum in a particular market, but in order to ensure acceptance, the applicant would have to first identify any available open filing window. This would require substantial review of FCC Public Notices and other filing records, as well as substantial engineering analysis. Compliance with such rigorous standards would necessarily result in competently-filed applications, an important public interest consideration.

III. Counterproposal

The following Counterproposal with respect to previously-filed applications is respectfully submitted.[8] The Commission should lift the recently-imposed filing freeze for the limited purpose of allowing any applicable filing window to extend for its full 30-day period for all applications filed on or before February 8, 1996. This would result in a very short filing window, at most thirty days, or even less for those applicants whose window has not already begun to run, using the proper pre-1995 filing procedures

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[8] The definition of previously-filed applications in this case would include those applications filed on February 8, 1996, the date of the adoption of the *Notice*, and one day before the *Notice* was released. See Petitioner's Request for Clarification, *infra*.

as described by the Commission itself in ¶12 of the *Notice*. At that point, the Commission would impose the interim licensing rules as proposed, processing grantable applications and holding mutually-exclusive applications until adoption of the final, possibly modified processing rules.

The terms of this Counterproposal are equitable and fair to all parties affected by the filing freeze, and do not change the thrust of the Commission's new policy to any marked degree. The Commission's resources would be conserved since very few new applications would be filed. If more were filed than expected, then most likely such applications would eventually be deemed mutually exclusive, and subject to dismissal once any new auction rules were adopted. Any inconvenience to the Commission's processing staff would be minimal under these circumstances.

IV. Concerns If Equitable Processing Not Continued

The subject applicants fear there are two underlying themes at work as the basis for the Commission's decision. The first is more readily apparent. That is, the Commission's interim processing rules, and particularly the filing freeze, are driven by its desire to make applicants pay for frequencies. The proposed rules will have the direct effect of either preserving the number of licenses currently issued or in fact reducing that number, making the geographic paging licenses available at auction in the future more valuable to prospective bidders.

Furthermore, what concern is it of the Commission's whether there is a great deal of spectrum available or, as observed in ¶13

of the *Notice*, that "there is relatively little desirable spectrum that remains available for licensing" on VHF and UHF paging channels in the 152 and 454 MHz bands.[9] Substitute the term "valuable" for "desirable", a reasonable synonym in this context, and the Commission's consideration of the worth of the spectrum is clear.

Section 309(j)(7)(A) of the Communications Act provides that, in making a decision to prescribe area designations and bandwidth assignments:

> ... the Commission may not base a finding of public interest, convenience and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection. (emphasis supplied)

It is manifestly clear that the Commission is doing just that if it establishes rules in contemplation of the value of paging spectrum, while at the same time it penalizes applicants already on file in favor of potential, as yet unidentified bidders for paging licenses.[10]

In addition, the subject 931 MHz paging applicants are aware of recent publicity concerning companies offering paging

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[9] The Commission notes that channels in the 931 MHz band "also are scarce in virtually all major markets and most mid-sized markets." *Notice* at ¶14.

[10] In fact, since the Commission is forbidden by statute to consider the revenues generated by auctions when instituting competitive bidding rules for a service, there is no reason why the Commission should institute a freeze at all. The Commission could simply utilize auctions for those applications which proved ultimately to be mutually exclusive after a date certain. Seen in this light, the only reason for a freeze is to maintain the "value" of the paging spectrum for future bidders, and to attempt to increase federal revenues from auctions in impermissible fashion.

application services to members of the public. It would seem to be no coincidence that, shortly after a multi-agency consortium representing the Federal government announces a crackdown on some companies offering paging application services, the FCC imposes a filing freeze on precisely these types of applications. By trying to punish some purveyors of paging application services indirectly, in essence killing the messenger, the FCC is only harming many innocent entrepreneurs who purchased legitimate applications prepared by reputable application service firms utilizing the collective assistance of engineering consultants, data base services and counsel, all to comply with the Commission's rules then in effect. While the Commission's intentions may be "good", the road to administrative perdition is paved with good intentions, improperly effectuated, as here.

V. Clarification Sought

Clarification of several positions asserted in the *Notice* is also sought. First, clarification is needed with respect to the FCC's statement that "we will therefore process 931 MHz CCP applications which were pending prior to the adoption of this *Notice*, and for which the 60-day window for filing competing applications has expired, under the application procedures in effect prior to January 1, 1995." As noted above, the Commission stated in ¶12 of the *Notice* that:

> We will use a 30-day filing window to define mutually exclusive applications as provided under our old paging rules, rather than the 60-day filing window adopted in the *Part 22 Rewrite Order*. *Id*. (emphasis supplied)

It is clear that the 60-day filing window was adopted in the *Part*

22 Rewrite Order as part of the new rules (since stayed). Consequently, the application of a 60-day window to applications filed prior to the adoption of the interim processing rules is not correct, by the Commission's own admission. Thus, the quoted language in ¶145 should be corrected to reflect the rest of the *Notice*, i.e, a 30-day window. (As noted above, this 30-day window will drastically reduce or eliminate the filing of any additional applications. Conversely, the retention of the incorrectly-imposed 60-day window and the addition number of applications that might be filed and deemed mutually exclusive during that extended period, would lend further credence to the Commission's apparent motive in freezing the number of existing paging licenses, thereby increasing auction revenues.)

931 MHz applications were filed on February 8, 1996, the date of the adoption of the *Notice*. The Commission's *Notice* is silent with respect to the status of applications filed on the adoption date, and clarification is needed with respect to this situation. If such applications are deemed to be subject to the freeze, then it is requested that the Commission return those applications and refund the filing fees tendered for all applications submitted on February 8, 1996. See 47 C.F.R. §1.1113(4). But the better logic is that these applications should be accepted since they were filed in good faith before the release date of the Notice and on the effective date of the *Notice*.

Wherefore, the above premises considered, it is respectfully requested that the Commission adopt the Counterproposal submitted

above and provide the clarifications requested.

Respectfully submitted,

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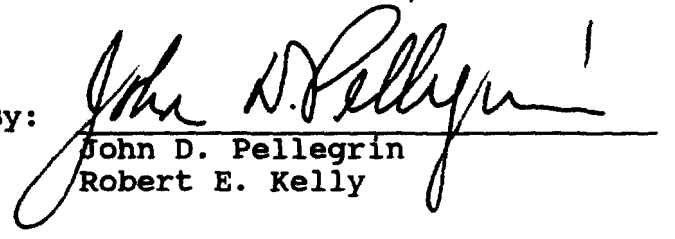
By: 
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